

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 January 2004

CASE NO.: 2003-BLA -5510

In the Matter of:

RONNIE LEE BOWER
Claimant

v.

MYSTIC ENERGY, INC.
Employer

and

WEST VIRGINIA COAL WORKERS'
PNEUMOCONIOSIS FUND
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

John Cline
For the Claimant

Robert Weinberger, Esq.
For the Employer/Carrier

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER –AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Beckley, West Virginia on October 1, 2003 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-36 and claimant's exhibits (CX) 1-7 were admitted into evidence. Claimant and employer submitted post hearing briefs.

ISSUES

- I. Existence of pneumoconiosis
- II. Causal relationship of pneumoconiosis and coal mine employment.
- II. Existence of total disability.
- IV. Causation of total disability.
- V. Material change in conditions.

The parties have stipulated that claimant was employed as a coal miner for thirty two years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ¹

Procedural History

Ronnie Lee Bower (claimant or miner) filed his first claim for benefits on October 8, 1998. The district director denied the claim on February 25, 1999 because the evidence did not establish any of the elements of entitlement. (DX 1) The present claim was filed on March 22, 2001 and was denied by the district director on October 24, 2002. (DX 3, DX 31) The case was referred to the Office of Administrative Law Judges on February 28, 2003. (DX 33)

Background

Claimant was born on August 30, 1940 and his only dependent is his wife Margaret. (DX 3, DX 13) Claimant was employed as an underground coal miner for thirty two years ending in August 1998. See DX 5-10, TR 9, 15. In his last job in the mines he was classified as an electrician. (TR 10) As an electrician, he shoveled coal for 45 to 90 minutes a shift, changed

¹ The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, EX=employer's exhibit, TR=transcript of hearing, BCR=board certified radiologist, B=B reader.

large tires on equipment, and dragged pumps weighing 75 to 150 pounds for 75 to 100 feet. (TR 11-14) Claimant is short of breath with exertion and coughs when he lies down. (TR 17) He takes Atrovent, Flonase, and a pill for his breathing. (TR 19) Claimant smoked cigarettes from 1964 to 1981 averaging three quarters of a pack a day. (TR 20)

Medical Evidence

The following is a summary of the medical evidence developed since the denial of the miner's first claim.

Chest x-rays

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>Interpretation</u>
DX 19, 20	6/13/01	Patel, BCR, B	1/0, p/s
DX 21	6/13/01	Binns, BCR, B	quality one
DX 30	6/13/01	Wiot, BCR, B	negative for pneumoconiosis
DX 29	2/13/02	Zaldivar, B	negative for pneumoconiosis
CX 4	7/17/02	Cappiello, BCR, B	2/1, p/p
CX 5	6/19/03	Patel, BCR, B	1/0, s/s

Pulmonary Function Studies

<u>Exhibit</u>	<u>Date</u>	<u>Height</u>	<u>Age</u>	<u>FEV1</u>	<u>FVC</u>	<u>MVV</u>
DX 18	6/12/01	68 in.	60	1.90	2.90	75
				2.03*	3.00*	---
DX 29	2/13/02	68 in.	61	1.90	3.44	79
				2.11*	3.73*	87*
CX 3	8/13/02	67.3 in.	61	1.88	3.22	83
				2.19*	3.58*	106*
CX 1	6/19/03	67 in.	62	1.68	3.37	51
				2.01*	3.56*	78*

*post bronchodilator

Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>PCO2</u>	<u>PO2</u>
DX 16	6/12/01	33.7	69.9
DX 17	6/14/01	35.4*	84.6*
DX 29	2/13/02	32	83
		37*	79*
CX 1	6/19/03	39	64
		35*	75*

*exercise values

Medical Reports

The miner was examined by Dr. Norma Mullins on June 12, 2001. (DX 15) Dr. Mullins recorded that claimant had smoked one pack of cigarettes a day from age twenty four to 1980 or 1981. She noted scattered rales and scattered wheezes in the physical examination. The chest x-ray was positive for pneumoconiosis, the FEV 1 was moderately reduced but the effort was not good, the diffusion capacity was normal, and the MVV was minimally reduced. Dr. Mullins diagnosed coal workers' pneumoconiosis and a mild to moderate respiratory impairment due to coal dust exposure. She stated that the miner has a 25% pulmonary impairment entirely due to his pulmonary conditions.

Dr. George Zaldivar evaluated claimant on February 13, 2002. (DX 29) He credited claimant with thirty two years of coal mine employment and recorded a smoking history of one pack a day from age twenty three or twenty four to 1990. Inspiratory crackles and a few scattered wheezes were heard in the physical examination. The chest x-ray was negative for pneumoconiosis. The pulmonary function studies showed a moderate irreversible airway obstruction, normal lung volumes, and a normal diffusing capacity, and there was a normal cardiopulmonary response to exercise. Dr. Zaldivar concluded that claimant does not have coal workers' pneumoconiosis. He determined that claimant has a moderate pulmonary impairment due to asthma aggravated by smoking because the diffusing capacity and blood gases are normal. Dr. Zaldivar stated that the miner is capable of performing his usual coal mine work if he takes bronchodilators which he is presently not taking. Dr. Zaldivar concluded that claimant does not have coal workers' pneumoconiosis because when pneumoconiosis causes obstruction the diffusing capacity is reduced which is not true of claimant.

On August 13, 2002, the West Virginia Occupational Pneumoconiosis Board found that claimant has occupational pneumoconiosis and a 25% pulmonary impairment. (CX 3)

Dr. D. L. Rasmussen examined the miner on June 19, 2003. (CX 1) He noted that claimant had thirty two years of coal mine employment and had smoked three quarters of a pack of cigarettes a day from age twenty three to 1980. In the physical examination there were rhonchi, wheezes, rales, and a prolonged expiratory phase with forced respirations. The chest x-ray was classified as 1/0, s/s. The pulmonary function studies showed a partially reversible obstructive ventilatory impairment, the diffusion capacity was normal, and there was minimal resting hypoxia. Dr. Rasmussen also conducted a treadmill exercise test. He determined that claimant does not retain the pulmonary capacity to do his last coal mine job, and that he has coal workers' pneumoconiosis arising from his coal mine employment which contributes to his pulmonary impairment.

After reviewing Dr. Zaldivar's report, Dr. Rasmussen submitted a report dated September 11, 2003. (CX 6) He stated that although the diffusing capacity may be reduced in coal miners, this is not a universal finding. Dr. Rasmussen declared that there is no scientific support for Dr. Zaldivar's assertion that a normal diffusing capacity rules out the presence of coal workers' pneumoconiosis. He continued to believe that the miner's pneumoconiosis is a major contributing factor in his pulmonary disease.

The record also includes the treatment records from the New River Breathing Center.
(CX 2)

Conclusions of Law

As the present claim was filed more than one year after the denial of the miner's prior claim, it is considered a subsequent claim. In subsequent claims, the evidence developed since the denial of the miner's prior claim must establish at least one of the elements of entitlement previously adjudicated against him. See § 725.309(d), *Lisa Lee Mines v. Director, OWCP*, 86 F. 3d 1358 (4th Cir. 1996)(en banc). Benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W. G. Moore & Sons, Inc.*, 9 BLR 1-4 (1986).

A finding of the existence of pneumoconiosis may be made based on chest x-rays, autopsies or biopsies, the presumptions in §§ 718.304, 718.305, or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.201.² § 718.202(a)(1)-(4). All types of relevant evidence must be weighed to determine if the miner has pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F 3d 203 (4th Cir. 2000).

Regarding the recent x-rays, two board certified radiologists/B readers, Dr. Patel and Dr. Cappiello, have found radiographic evidence of pneumoconiosis, while only one board certified radiologist/B reader, Dr. Wiot, and one B reader, Dr. Zaldivar, found no x-ray evidence of pneumoconiosis. As the x-ray readings by dually qualified physicians are entitled to greater weight than the readings of physicians who are not dually qualified, *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), I find that the preponderance of the recent x-ray evidence is positive for pneumoconiosis.

There is no biopsy evidence and claimant is not entitled to the above-mentioned presumptions.

Dr. Mullins, Dr. Rasmussen, and the Occupational Pneumoconiosis Board concluded that claimant has pneumoconiosis. Dr. Zaldivar is the only physician to determine that the miner does not have pneumoconiosis. The opinions of Drs. Mullins and Rasmussen and the Board are well reasoned and consistent with the miner's extensive underground coal mine employment and the x-ray evidence of record. Dr. Zaldivar relied on the absence of a reduced diffusing capacity for his conclusion that the miner does not have pneumoconiosis, but he did not cite any medical studies to support his theory. He also seemed to concentrate on medical pneumoconiosis and did not fully consider whether claimant has legal pneumoconiosis, i. e., a chronic lung disease or impairment arising out of coal mine employment. I give little weight to Dr. Zaldivar's opinion. The recent x-ray readings and medical opinions support a finding that claimant has pneumoconiosis.

² Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and it includes both medical, or clinical, pneumoconiosis and statutory, or legal pneumoconiosis.

A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. § 718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability shall be established by pulmonary function studies showing the values equal to or less than those in Appendix B, blood gas studies showing the values in Appendix C, the existence of cor pulmonale with right sided congestive heart failure, or the reasoned and documented opinion of a physician finding that the miner's pulmonary or respiratory impairment prevents him from engaging in his usual coal mine work and comparable and gainful work. § 718.204(b)(2).

The prebronchodilator values from the June 12, 2001 and June 19, 2003 pulmonary function studies are qualifying; the remaining studies are nonqualifying. However, the FEV1 values from all the pulmonary function studies are uniformly low even after bronchodilators were given, rarely exceeding 70% of the predicted values. None of the blood gas studies is qualifying and there is no evidence of cor pulmonale. Dr. Mullins and the Board assessed a 25% pulmonary impairment but there is no analysis as to whether this degree of impairment would preclude claimant from performing his last coal mine work. Dr. Rasmussen did make such a finding, however, and Dr. Zaldivar stated that claimant can do his usual coal mine work only if he takes bronchodilators, an extremely speculative conclusion. There is obviously no way of determining whether claimant's use of bronchodilators would allow him to do the heavy labor he performed in last coal mine job. After weighing the recent evidence, I find that it establishes claimant's total disability.

As the recent medical evidence establishes the existence of pneumoconiosis and total disability, two elements previously adjudicated against the miner, he has demonstrated a material change in conditions and all the evidence of record must be evaluated to determine claimant's eligibility for benefits. *Lisa Lee Mines*.

Although two of the three x-ray readings from the prior claim are negative for pneumoconiosis, pneumoconiosis is a progressive disease and recent x-rays are more probative as to its existence. See § 718.201(c), *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984). The x-rays from the current claim are three to five years more recent than the x-rays from the prior claim and are therefore entitled to more weight. I also note that the only medical report in the first claim was by Dr. Rasmussen who diagnosed coal workers' pneumoconiosis. Upon evaluating all the evidence of record, I find that claimant has pneumoconiosis.

With over ten years of coal mine employment, claimant is entitled to the presumption in § 718.203(b) that his pneumoconiosis arose out of coal mine employment. There is no evidence of record that rebuts this presumption.

In the prior claim, Dr. Rasmussen determined that claimant is disabled from heavy and very heavy manual labor, which would preclude him from doing the work of his last coal mine job. The pulmonary function studies of December 7, 1998 are nonqualifying but the more recent pulmonary function studies have reduced values and clearly show a decline in the miner's

pulmonary condition. As with the chest x-rays, the more recent studies are more probative regarding claimant's present pulmonary capacity. I find that the evidence of record demonstrates that the miner is totally disabled.

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's total disability if it: (i) Has a material adverse effect on his respiratory or pulmonary impairment; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1).

Dr. Mullins, Dr. Rasmussen and the Board attribute claimant's pulmonary impairment to his pneumoconiosis. Dr. Zaldivar stated that claimant's pulmonary condition is a result of asthma but as he did not diagnose pneumoconiosis, his opinion on etiology can not be credited. *See Scott v. Mason Coal Co*, 289 F. 3d 263, 269 (4th Cir. 2002). I conclude that claimant is totally disabled due to pneumoconiosis.

The evidence establishes all the elements of entitlement. As the evidence does not clearly establish an onset date of total disability due to pneumoconiosis, benefits will be awarded as of March 1, 2001, the first day of the month in which the claim was filed. § 725.503(b). Claimant's counsel has thirty days to file a fully supported fee application and his attention is directed to §§ 725.365 and 725.366. The employer has twenty days to respond with objections.

ORDER

IT IS ORDERED THAT Mystic Energy Inc. and the West Virginia Coal Workers' Pneumoconiosis Fund:

- (1) Pay claimant all the benefits to which he is entitled, augmented by one dependent, beginning as of March 1, 2001; and
- (2) Pay claimant all the medical benefits to which he is entitled beginning as March 1, 2001.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this Decision and Order was filed in the office of the district director, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210

